

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Modernization of Media)
Regulation Initiative)

MB Docket No. 17-105

**COMMENTS OF HOWARD D. LEIB, ESQ., IN REPLY TO AND IN SUPPORT OF
CERTAIN COMMENTS OF AMERICA'S PUBLIC TELEVISION STATIONS,
CORPORATION FOR PUBLIC BROADCASTING, NATIONAL PUBLIC RADIO, INC.,
AND PUBLIC BROADCASTING SERVICE**

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I submit this response in support of certain of the comments of America's Public Television Stations, et al. Specifically, I write in support of their comment urging that the FCC should "revisit what constitutes actionable, indecency, what process should be implemented for reviewing and acting on complaints, (given that these matters can take many years), and what sanctions are appropriate for violations, particularly in context-related circumstances such as typically arise on an NCE station."

Although I do a radio program on WRFI - Watkins Glenn/Ithaca New York, and function as pro bono counsel to that Community Broadcasting station, and although I teach Trademark Law at Syracuse College of Law and Entertainment Law at Cornell Law School, I write as a private citizen, albeit one who is directly affected by these rules.

While I support the position of PBS, et al. that the Commission should revisit these rules, I would go further and urge the Commission to revise these rules so as to leave decisions concerning indecency to each station's discretion. In this day and age, with the plethora of programming choices available to adults and children alike, it is illogical to regulate only two of those, television and radio, and only a small portion of those, specifically terrestrial television and radio.

Further, the overarching justification for this ruling has never be correct. As has been widely acknowledged since before the days of the *Pacifica v FCC*¹ dispute, there are significant numbers of minors in the audience for terrestrial radio and television regardless of the day part.

Respondant further urges the Commission to abandon the rule in light of the Supreme Court's recent ruling in *Matal v. Tam*². In that decision, the Supreme Court found that regulation of disparaging trademarks ran afoul of the First Amendment. The regulation at issue did not bar the speech, but merely denied it trademark registration. Respondent believes that *Matal* indicates the evolution the Supreme Court has made since its ruling in *Pacifica*, and postulates that the Commission's efforts to bar or limit indecent speech violates the same protections that the Supreme Court validated in *Matal*. And would, were the matter litigated today, result in a ruling similar to that in *Matal*.

The very speech at issue in *Pacifica*, George Carlin's so-called "7 Dirty Words" routine, demonstrates the issue. In that routine, Mr. Carlin is actively discussing American society's relationship to certain indecent, but not obscene, words. In discussing those words, Mr. Carlin uses those words. Respondent fails to see how a thorough, reasonable conversation on that topic can be held without the use of the words, unless the speaker is forced to use euphemisms, in the hopes that listeners will know what the speaker is truly saying. If the listener does so understand, then nothing has been achieved by prohibiting the language. If the listener does not so understand, then the content of the speech has been suppressed.

¹ 438 US 726 (1978)

² Docket No. 15-1293, Decided June 19, 2017, citation pending.

Respondent understands this problem first hand. Respondent's program on WRFI, "No Soap Radio," focuses on comedic material, programmed around a topic. Respondent must regularly forego broadcasting otherwise funny, brilliant and insightful material, because it contains profanity that would, in the show's 4:00 PM time slot, risk violating the Commission's dictates. Respondent feels that his speech, the speech of the comedians who cannot be broadcast, and, by extension, the speech of our listeners have all been curtailed.

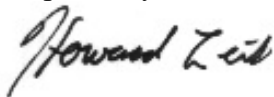
At the least, responder would urge the Commission to carve out an exception to the requirements for Non-Profit Community Broadcasters. Such Community broadcasters represent the ideal of broadcast communication. We are members of the community, broadcasting to members of the community. Almost by definition, we represent the community's standards of what is reasonable to broadcast within our communities.

Additionally, stations such as WRFI have tiny budgets. There is certainly no money in the budget to pay counsel to consult on matters relating to indecency. Any decisions on what is and is not within the Commission's regulations must, of necessity, be taken on the side of caution, as there is no budget, or staff, to determine where the line is, if such can actually be determined, nor to defend against a complaint nor to pay a fine were one to be levied. This leads to a level of self-censorship that, Respondent believes, demonstrates the vague and violative nature of the current regulations, and which flies in the face of the First Amendment.

Conclusion

Respondent appreciates the Commission's willingness to review and reconsider outdated and unnecessarily burdensome rules applicable to community radio stations. It is hoped that the Commission will, in the spirit of reducing the regulatory burden, especially on small, community stations, look to dispensing with these out-dated and ill-effective rules.

Respectfully submitted,

A handwritten signature in cursive script that reads "Howard Leib".

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